No. 274.
Brief of Goodhue for Appt.



NO. 274.



# SUPREME COURT

—OF THE—

# UNITED STATES.

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THE UNITED STATES, Appellant,

vs.

THE TENNESSEE & COOSA RAILROAD CO., HUGH CARLISLE, ET ALS, Appellees.

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BRIEF OF AMOS E. GOODHUE,

ON BEHALF OF THE TENNESSEE & COOSA RAILROAD COMPANY,

ANNA J. HENDERSON, HEIR OF HUGH CARLISLE, AND

MARY CARLISLE, THE WIDOW OF HUGH CARLISLE.

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ON BEHALF OF THE TENNESSEE & COOSA RAILROAD COMPANY AND ANNA J. HENDERSON, HEIR OF HUGH CARLISLE, AND MARY CARLISLE, THE WIDOW OF HUGH CARLISLE.

## STATEMENT OF CASE.

On the 3d day of June, 1856, an Act of Congress was approved entitled, "An Act granting public lands in alternate sections to the State of Alabama to aid in the con-

struction of certain railroads in said State." Among the provisions of said Act are the following:

"Be it enacted, etc., That there be and is hereby granted to the State of Alabama, for the purpose of aiding in the construction of railroads; from the Tennessee river, at or near Gunter's landing to Gadsden, on the Coosa river, * * * * * * every alternate section of land designated by odd numbers for six sections in width on each side of said road."

"Sec. 3. And be it further enacted, That the said lands hereby granted to the said State shall be subject to the disposal of the Legislature thereof for the purposes aforesaid and no other. * * *

"Sec. 4. And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior, that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each such roads, may be sold; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

On the 20th day of January, 1858, the Legislature of Alabama passed an act accepting the grant and granting to

the Tennessee & Coosa Railroad Co., such portion of the lands as were granted to the State by the Congressional act to aid in the construction of a railroad from Gunter's Landing to Gadsden.

On the 18th day of January, 1859, the Tennessee & Coosa Railroad Co., filed in the office of the Secretary of the Interior its map of definite location. The road thus located was about thirty-six miles in length. The initial point from which the first twenty miles commenced was Guntersville. The one hundred and twenty sections of land to which the Tennessee & Coosa Railroad Co., was entitled in advance of the completion of any portion of the road were calculated on the basis of Guntersville as the starting point; and embraced the odd numbered sections on either side of the line of road as located for twenty miles out from Guntersville, southeast toward Gadsden. These lands were duly ce tified to the Tennessee & Coosa Railroad Co., in June 1860. (See exhibit "A" to original bill, pages 16 to 30 printed transcript.)

Prior to the breaking out of the war between the States much work was done on the line of road. The road was made ready for the cross-ties along a portion of the route. Great and expensive cuts were made through the mountains between Guntersville and Littleton in the direction of Gadsden. But in fact no part of the road was at this time completed and put in operation. The work on a large part of the road was let to Hugh Carlisle in the year 1859. Carlisle contracted with the Tennessee & Coosa Railroad Co., to construct a part of the road. (See pages 210 to 212 of the printed transcript.) Reverses of one sort and another, which are fully set out in the answers of Hugh Carlisle and

of the Tennessee & Coosa Railroad Co., delayed and hindered the completion of the road.

In 1871 the road from Gadsden to Attalla was completed, put in operation, and has been in operation ever since up to the present time. In 1887 the road from Attalla to Littleton was completed and put in operation. Since 1887 the road from Gadsden to Littleton, a distance of 10.22 miles, has been in continuous operation. IT ALSO APPEARS FROM THE RECORDS THAT PRIOR TO THE FILING OF THE BILL IN THIS CASE THE ENTIRE ROAD FROM GADSDEN TO GUNTERSVILLE WAS COMPLETED AND PUT IN OPERATION. (See statement of witness Curry on page 289 of printed transcript, and also see statement in opinion of Judge Bruce on page 255 of transcript, where Judge Bruce says: "It is to be noted in this connection that at the date of the passage of the forfeiture act, the said railroad as contemplated in the granting act from Guntersville on the Tennessee river to Gadsden on the Coosa was in process of construction, nearing completion, AND WAS, IN FACT, COMPLETED AND IN ACTUAL OPERATION BEFORE THIS BILL WAS FILED."

Although for the purpose of dividing the road into sections of twenty miles each as provided in the granting act, Guntersville was the starting point, yet the iron was laid from Gadsden as a starting point and the road was first built and put in operation from Gadsden northward as far as Littleton in the direction of Guntersville. Littleton is 10 and 22-100 miles north of Gadsden. Attalla is five miles north of Gadsden on the line between Gadsden and Littleton. Attalla is the point of intersection of the Tennessee & Coosa Railroad and the Alabama Great Southern Railroad. The Alabama Great Southern Railroad was formerly

known as the Alabama & Chattanooga Railroad. The Alabama & Chattanooga Railroad Co. is also a land grant company, so that the odd numbered sections opposite to that part of the Tennessee & Coosa Railroad extending from Gadsden to Littleton are within the conflicting limits of the two grant , and in these lands each railroad company becomes entitled to an undivided moiety.

In the period of time intervening between 1872 and 1887 the Tennessee & Coosa River Railroad Co., sold a great portion of the lands in controversy in small parcels of from forty to one hundred and sixty acres to numerous settlers who paid part of the purchase money, giving notes for balance and taking in each instance bonds for titles from the Tennessee & Coosa River Railroad Co. By reference to pages 97 to 123 of the record it will be seen that from five hundred to six hundred such sales were made.

After the war between the states the Tennessee & Coosa River Railroad Co. had no money. Carlisle was a man of wealth. On the 14th day of December, 1883, the Board of Directors of the Tennessee & Coosa River Railroad Co. passed certain resolutions which will be found on pages 212 and 213 of the record. The purport of these resolutions was to recognize the indebtedness due to Carlisle for work previously done; to contract with him to construct, build and equip the road and put it in running order, and to declare a lien on the road and all its property, including the lands in controversy, to secure the amount the company owed Carlisle, and also whatever further debt might be incurred in his efforts to complete the road. And here the attention of the Court may be called to the fact that in 1859 the T. & C. Railroad Co. executed a mortgage on all its property to secure $400,000 of bonds. These bonds were in the de-

nomination of $1,000 each. In 1860 Judge Wyeth, the president of the Tennessee & Coosa Railroad Co., turned over to Hugh Carlisle eleven of these bonds to secure the debt due Carlisle. These bonds remained in Carlisle's possession until February, 1887, when the deeds conveying the lands in controversy to Carlisle, were executed by the Tennessee & Coosa Railroad Co., and the bonds then surrendered for cancellation.

During the years 1884–5–6–7, Carlisle continued to operate the road between Gadsden and Attalla and to push the work of construction between Attalla and Guntersville. During that period of time the company had not a single dollar except what it got from Hugh Carlisle. His own testimony, the testimony of the company's bookkeeper, Mark Johnson, the testimony of the company's attorney, Wm. H. Denson, and Henry L Miller, a director, abundantly establish the expenditures made by Carlisle on behalf of the company during this period of time. In this way the T. & C. R. R. Co. became indebted to Carlisle in a sum exceeding $100,000. In part payment of this indebtedness the T. & C. R. R. Co. conveyed to Carlisle 23,789 51-100 acres of land at $2.50 per acre. This deed bears date February 7, 1887, and will be found on pages 43 to 51 of the transcript. The land embraced in this deed is land which had been certified to the T. & C. R. R. Co. as a part of the first one hundred and twenty sections, which by the terms of the granting act the railroad company was authorized to sell in advance of the completion of any part of the road. On the 4th day of April, 1887, the T. & C. R. R. Co., in further partial payment of this debt conveyed to Hugh Carlisle 17,410 23-100 acres at $1.25 an acre. This deed will be found on pages 27 to 4[illegible] of the transcript. The land de-

scribed in this deed was land lying beyond the first 120 sections was within the primary conflicting limits of the land grants in aid of the Tennessee & Coosa Railroad Co., and the Alabama & Chattanooga Railroad Co. The Tennessee & Coosa Railroad Co. therefore had an undivided moiety in this land.

On the 29th day of September, 1890, Congress passed an act, the material portion of which is as follows:

"Be it enacted, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminus with the portion of any such railroad not now completed and in operation for the construction or benefit of which such lands were granted, and all such lands are declared to be a part of the public domain.

On the 31st day of October, 1891, the bill in this case was filed seeking to declare and enforce a forfeiture of the entire grant because of the non-compliance with the conditions of the grant. Among the allegations of the bill will be found the following: "Orator states, charges and avers that both of said instruments were made during the year 1887, more than twenty years after the expiration of the time, within which the Act of June 3, 1856, required the said railroad to be constructed and completed. Orator avers that at the time said instruments were executed, the said railroad company had no right, power or authority to execute said instruments or to convey any right, title or interest in or to said lands, and that the officers, agents and directors of the said railroad company, and the said Hugh Carlisle well knew this fact, and for the purpose and with the intention of preventing the reversion of said lands to

the United States, the said company executed, and the said Carlisle accepted the pretended conveyances; that while said conveyances recite a valuable consideration paid by said Carlisle for said lands, in truth and in fact no money or thing of value was paid therefor by said Carlisle, but the whole transaction was merely a device to mislead and deceive and for the purpose of enabling the said Hugh Carlisle to set up and claim that he held said lands as a purchaser for value and in good faith from said Railroad Company. That said conveyances were not made, nor was the said land sold for the purpose of aiding in the construction of said railroad, or any part thereof, that no part of any consideration recited to have been paid for said lands was used in the construction of said railroad, that said Carlisle was, and is not, a bona fide purchaser for value of any of said lands, but a purchaser mala fide, well knowing that the said purchase was in violation of the terms of the act of June 3, 1856. Orator further avers that while said Carlisle claims to own these lands under the conveyance made to him by said railroad company, he in truth and in fact holds the same under a secret trust for said railroad company and the stockholders thereof. * * * And by resolution of this board of directors so composed the conveyances marked exhibits "D" and "E" were made and executed to said Carlisle for the purpose of defrauding your orator, the United States, out of these lands." The answers of Hugh Carlisle and the Tennessee & Coosa Railroad Co. specifically and fully deny these averments, and set up that all the sales made by the Tennessee & Coosa Railroad Co., whether to Hugh Carlisle or other parties, were made in good faith

and in strict accordance with the terms of the granting act.

The litigation in the court below was conducted in the name of the United States by Hon. F. S. White, who was employed for this purpose by the settlers on the land, who were mainly purchasers from the Tennessee & Coosa Railroad Co. holding bonds for title from the Tennessee & Coosa Railroad Co., only a small part of the purchase money having been paid. The object of these settlers in pressing this litigation was to avoid the payment of the purchase money due to the Tennessee & Coosa Railroad Co., and obtain the land from the Government by homestead entry. (See statement of W. W. Curry, Jr., chairman of the committee that employed Mr. White, on page 238 of the transcript.)

A part of the land conveyed to Carlisle had been previously sold (but not conveyed) to the settlers above referred to, when this was the case, Carlisle stepped into the shoes of the railroad company in regard to such lands taking the purchase money notes and assuming the obligation of the company to convey upon full payment of purchase money. Upon the hearing of the case the court below ascertained the following facts. (See pages 255-6 of transcript.)

"First: The court finds that prior to the 29th day of September, 1890, the Tennessee & Coosa Railroad Co. had sold to bona fide purchasers all the lands embraced in the first 120 sections, which by the terms of the granting act it was authorized to sell in advance of the construction of the road. That these sales were bona fide, and made to aid in the construction of the road. That the allegations of the bill, that the sale to Carlisle, was without consideration and colorable, are not sustained by the evidence, but the sale to

Carlisle was bona fide and based on good consideration, and the proceeds of the sale used in the construction and equipment of the road."

"Second: The court finds that the Tennessee & Coosa Railroad from Gadsden to Littleton, a distance of 10.22 miles was completed and in operation on and before the 29th day of September, 1890, and that lands described in exhibit "B" to the original bill, to-wit: The lands embraced in and conveyed by the deeds from the Tennessee & Coosa Railroad Co. to Hugh Carlisle, bearing date the 4th day of April, 1887, are lands which lie opposite to that part of the road which was completed and in operation on the 29th day of September, 1890, and therefore not within the lands forfeited by the act of September 29, 1890."

Upon these facts the Court was of the opinion that there had been no forfeiture of the lands as to which a judicial declaration of forfeiture was sought by the bill, and accordingly ordered and decreed that the relief sought by the bill be denied and the bill dismissed. From this decree the United States appealed to the Circuit Court of Appeals for the Fifth Circuit. On the 20th day of April 1897, the Circuit Court of Appeals affirmed the decree of the Circuit Court, rendering a very short opinion which tersely sums up the whole case in a nut shell.

"Considering that the Tennessee & Coosa Railroad Co. had the right to sell the one hundred and twenty sections of the land grant before the act of forfeiture, and that the forfeiture act of 1890 did not forfeit any portion of the land grant lying opposite to and coterminus with that portion of the railroad then completed and in operation we find no error

in the decree appealed from, and it is therefore affirmed." From this decree of affirmance the United States again appeals to this court.

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## PROPOSITIONS OF LAW INVOLVED IN THE CASE.

The bill seeks to enforce an alleged forfeiture under the act of Sept. 29, 1890. The land sought to be forfeited is:

First: The one hundred and twenty sections which the Tennessee & Coosa Railroad Company was authorized to sell in advance of the completion of the road or any part thereof.

Second: Land lying opposite to that part of the road which was completed and in operation on Sept. 29, 1890, the date of the passage of the forfeiture act.

The findings of fact made by the trial court and affirmed by the Circuit Court of Appeals are binding here, if there be any evidence to support them.

Dravo vs. Fabel, 132 U. S. 487.

Runkle vs. Burnham, 153 U. S. 216.

An examination of the record will show that the findings of fact are abundantly sustained by the evidence. In this argument therefore, facts found by the trial judge will be assumed as true.

With regard to the first one hundred and twenty sections, the fact is that this land was sold by the Tennessee & Coosa Railroad Co. prior to September 29, 1890, to bona fide purchasers, and the proceeds of sale used in the construction and equipment of the road. The bulk of the land was sold to Carlisle, and the Court specially finds that "the sale to Carlisle was bona fide, based on a good consideration,

and the proceeds of sale used in the construction and equipment of the road." No part of this land was sold prior to June 3, 1866, but all was in good faith sold before the passage of the forfeiture act. The contention on the part of the United States is that the purchasers having bought after the expiration of the ten years named in the act, obtained no title. The contention on the part of appellees with regard to the first one hundred and twenty sections is fourfold.

In the first place we contend that the condition in the act of June 3, 1856, is a condition subsequent, is not self-operative, and does not take effect until the United States takes some action to enforce the condition, and that until such action is taken the title to the land, together with the right to sell the land, remains in the land grant company.

We insist that this contention is fully sustained by the leading case:

Schulenberg vs. Harriman, 21 Wallace 44.

"The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. * * * * The prohibition against further sale if the road be not completed within the period prescribed adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the land shall then revert; if the condition be not enforced, THE POWER TO SELL CONTINUES AS BEFORE ITS BREACH limited only by the

objects of the grant and the manner of sale prescribed in the act."

In Railroad Land Co. vs. Courtright, 21 Wallace 310, this language is used in the opinion of the Court: "The further conditions as to the completion of the road imposed by the State were conditions subsequent, and not conditions precedent as contended by the defendant. The terms in which the right is reserved by the act of the State to resume the lands granted imply what the previous language of the act declares, that a present transfer was made and not one dependent upon conditions to be previously performed. The right is by them restricted to such lands as AT THE TIME OF THE RESUMPTION had not been previously disposed of. The resumption, therefore, of the grant by the failure of the first company to complete the road did not impair the title to the lands which the act of Congress authorized to be sold in advance of such completion and which were sold by that company."

It will be noted that in the Courtright case the Court fixes the limit of time in which the lands may be lawfully disposed of AT THE TIME OF THE RESUMPTION and not at the time of the breach of the condition. In the Courtright case the facts are very similar to the facts in the case at the bar. In the Courtright case the Iowa Central Air Line Railway Company took the land subject to the conditions imposed by an act of the Legislature providing that seventy-five miles should be completed within three years from Dec. 1, 1856. The railroad company never did complete any portion of the road, but in 1857–8 did some grading. The lands were sold to one Courtright, a contractor, to whom the railroad company had become indebted for grading. Subsequently a forfeiture was declared and

the lands were granted again to another company. This court held Courtright's title good.

The construction contended for by opposing counsel would allow the United States to remain silent until the road was completed and then enforce a forfeiture by reason of the breach of condition occurring years before the completion of the road.

"Forfeiture for breach of condition that the road should be completed in a specified time could only be enforced by legislative enactment, or judicial proceedings, IN THE ABSENCE OF WHICH THE ROAD MIGHT BE COMPLETED AND FORFEITURE THEREBY PREVENTED EVEN AFTER THE TIME LIMITED HAD EXPIRED."

United States vs. Willamette Val. C. M. Wagnon Road Co., 55 Fed. Rep. 712.

Bybee vs. Oregon & California R. R. Co., 139 U. S. 675.

U. S. vs. Burlington & M. R. R. Co., 98 U. S. 334.

In the case of Bybee vs Oregon & California R. R. Co., above cited, the Supreme Court approves the remark of the learned Judge of the Court below: "It is to become null only so far as to allow the grantor to resume the grant on a failure to comply with the conditions, and then only as to the lands remaining unpatented or unearned; and but for this qualification the grant might have been wholly resumed or forfeited for any failure to comply with the conditions even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of Congress in making the grant. A condition that would put it beyond the power of the Company to build the last mile of its road by the aid of the granted land is manifestly so harsh and unjust, that the breach of such conditions ought not to be treated as a for-

feiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction."

Lands which were lawfully sold under lawful authority granted by a former Act of Congress were not subject to forfeiture, and do not fall within the spirit, and meaning, and purpose of the Forfeiture Act, although they were fully within the letter of the Act. "It is not the words of the law," says the ancient Plowden, "but the internal sense of it, that makes the law: the letter of the law is the body; the sense and reason of the law is the soul."

The Forfeiture Act will not be so construed as to divest vested rights.

"The legislative power extends only to the making of laws and in its exercise it is limited and restrained by the paramount authority of the Federal and State Constitution. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another without trial and judgment in the Court."

Cooley on Constitutianal Limitations 100.

The authorities cited by opposing counsel to the effect that an estate upon condition subsequent is alienable and passes into the hands of the alienee, subject to be divested by the re-entry of the grantor, have no application to the case at bar. The grant in question armed the State with the unqualified right to dispose of the land for the purpose of constructing the railroad; and it is undisputed that if the ale had occurred during the ten years, the title in the purchaser would be perfect WHETHER THE ROAD WAS EVER COMPLETED OR NOT. Then if this estate continues until re-entry (or what is equivalent to re-entry) by the grantor, the power to sell also continues, as stated in the Schulenberg case "as before the breach." Surely Con-

gress cannot be accused of the folly of leaving this land for twenty-five years, after the ten years had expired, in the hands of the State and the railroad company when neither the State nor railroad company had the right further to apply the lands to the uses and purposes set forth in the granting act. The non-action of Congress implied the consent of Congress that the State and railroad company might continue to apply the lands to the uses and purposes named in the granting act "limited only by the objects of the grant and the manner of sale prescribed in the act." It will be observed that in 1887 Congress expressly declined to forfeit these grants, but directed their adjustment. See Act approved March 3d, 1887, Supplement to Revised Statutes, Vol. I., page 564. The record shows that in the case at bar this adjustment was had. See pages 123–125 record.

The doctrine laid down in the leading cases of Schulenberg vs. Harriman and Railroad Land Company vs. Courtright cited supra has been frequently reaffirmed by the Supreme Court of the United States.

Deseret Salt Company vs. Tarpey, 142 U. S. 241.

Wisconsin Railroad Company vs. Price County, 133 U. S. 496.

United States vs. Southern Pacific Railroad Company, 146 U. S. 570.

St. Paul Railroad Company vs. Phelps, 137 U. S. 523.

In Mathis vs. Tennessee & Coosa Railroad Company, 83 Alabama 415, the Supreme Court of Alabama passing on the title to a portion of the lands involved in this suit declared in reference to a sale made by the Tennessee & Coosa Railroad Company to Mathis in 1877 (after the ten years had expired), that if the land lies in the first one hundred and

twenty sections, the railroad company had the right to sell and Mathis got a good title.

We call attention to the fact that the construction contended for by counsel for appellees is the construction uniformly given to such granting acts by the Department of the Interior. In re Wisconsin Railroad Company 6th Departmental Decisions 190, Secretary Lamar in construing a grant to the State of Wisconsin, similar to the one now under consideration, said; "It seems to me, in view of the language of the Supreme Court, that the prohibition against the issuance of patents like prohibition against further sales adds nothing to the force of the provision. It is but the expression of that which was necessarily implied. The provision that the land should revert on the happening of the contingency necessarily implied equally the non-issue of patents and the stoppage of sales. The whole section and the whole act must be construed together and the object of Congress ascertained. The Supreme Court says: That object was no more than a provision that the grant shall be void if a condition subsequent be not performed. Upon failure to perform the condition subsequent, it was in the power of Congress alone to declare the forfeiture; and if the forfeiture was not enforced, the Court says: 'The power to sell continues as before its breach, limited only by the objects of the grant and the manner of the sale supplied by the act.' No forfeiture having been declared in relation to this grant, THE POWER OF SALE THEREUNDER CONTINUES AS THOUGH NO BREACH OF CONDITION HAD OCCURRED, AND THE PARTIES IN INTEREST ARE ENTITLED TO PATENTS AS EVIDENCE OF THEIR TITLE AS TO ALL THE LANDS ALONG THE CONSTRUCTED PORTION OF SAID ROAD."

To the same effect will be found an able and lengthy opinion of Secretary Lamar accompanying an opinion of Vivian Brent, Assistant Attorney-General, in re Wisconsin R. R. Mortgage Land Co., 6th Dept. Dec., page 81. In this case Secretary Lamar uses this language: "In as much then as after the lapse of twelve years from the rendition of that decision no forfeiture has been enforced by or under authority of Congress, the title of the State is unimpaired to the lands described in grant." (See also opinion of Secretary Lamar in re Oregon Central R. R. 5th Dept. Dec. 549, and in re Chicago, St. Paul M. & O. R. R. Co., 5th Dept. Dec. 511.)

In the letter of Hon. John W. Noble to the Commissioner of the General Land Office, dated Jan. 30, 1891, in reference to the land grant in question in this case the Secretary of the Interior says: "I think it is well settled that if the 120 sections certified to the State have been sold to bona fide purchasers under the authority contained in the fourth section of the granting act these sections are not in any manner affected by the forfeiture act for the reason that the act of Congress making the grant authorized the sale of said 120 sections in advance of the construction of any part of the road free from any restrictions as to what part of the road the land should be taken, provided they were included in a continuous length of twenty miles on each side of said road, and the purchasers of said sections took a valid title to the property, although no part of the road was constructed at the time, WHICH IF IN THE HANDS OF BONA FIDE PURCHASERS AT THE DATE OF THE FORFEITURE ACT OF SEPT 29TH, 1890, WAS NOT IN ANY MANNER AFFECTED BY SAID

ACT FORFEITING THE GRANT TO THE STATE TO AID IN THE CONSTRUCTION OF SAID ROAD."

If our contention as to the construction of the granting act be correct, then the equity of the bill filed by the United States in the case at bar rests entirely upon the allegations in the bill to the effect that Carlisle was not a bona fide purchaser, paid nothing for the lands, and holds the same in secret trust for the railroad company and the stockholders thereof. The trial court found that these allegations were not sustained by the evidence and that the sale to Carlisle was bona fide and based on a good consideration, and proceeds were used in the construction of the road. Then, if it be true that the right to sell continued after the breach up to the time of declaration of forfeiture, it follows that as to the first one hundred and twenty sections the decree was right and it should be affirmed.

Our second contention with regard to this one hundred and twenty sections is that as to the first one hundred and twenty sections the grant was by the terms of the granting act AN ABSOLUTE, UNCONDITIONAL GRANT, and THEREFORE NOT SUBJECT TO FORFEITURE, and that as the lands in controversy had been lawfully certified to the State and by the State conveyed to the railroad company in 1860, THE FORFEITURE ACT HAS NO REFERENCE TO THESE LANDS AND REFERS ONLY TO LANDS THAT HAD NOT BEEN SO CERTIFIED.

By reference to the act of June 3, 1856, it will be observed that the State was authorized to sell the first one hundred and twenty sections without any condition whatever and that as each twenty miles were completed another one hundred and twenty sections is authorized to be sold,

and the section of the act referred to concludes, "If any of said road is not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States." Now what is meant by "no further sale?" We insist that this means no sale of other and different lands than those authorized to be sold by the preceding clauses of the act, shall be made. What is meant by the "lands unsold?" We insist this means the lands that have not, by the preceding terms of the act, been authorized to be sold. Neither of these expressions refer to land that have been lawfully certified to the State or Railroad Company. Lawfully certified lands are regarded as earned lands and are not subject to forfeiture.

The Tennessee & Coosa Railroad Co. holds certificates from the Land Department to these lands. These certificates are by the granting act authorized to be issued as to the first one hundred and twenty sections in advance of the completion of any part of the road. These certificates are equivalent to patents, and are "evidence that the grantee has complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions."

Deseret Salt Company vs. Tarpey, 142 U. S. 251.

Frasher vs. O'Connor, 115 U. S. 102.

Marquez vs. Frisbie, 101 U. S. 473.

Maxwell Land Grant case, 121 U. S. 381.

In the case of the United States vs. Stone, 2 Wallace 525, the Supreme Court of the United States says, "A patent is the highest evidence of title and is conclusive against the government, and all claiming junior patents or titles

until it is set aside or annulled by some competent tribunal."

This construction of the granting act is expressly declared by the Supreme Court of the United States in the case of Railroad Land Company vs. Courtright, 21 Wallace 310. "The act of Congress by its express language authorized the sale of one hundred and twenty sections in advance of the construction of any part of the road. IT WAS ONLY AS TO THE SALE OF THE REMAINING SECTION THAT THE PROVISION REQUIRING A PREVIOUS COMPLETION OF TWENTY MILES APPLIES. IT IS TRUE IT WAS THE SOLE OBJECT OF THE GRANT TO AID IN THE CONSTRUCTION OF THE RAILROAD, AND FOR THAT PURPOSE THE SALE OF THE LAND WAS ONLY ALLOWED, AS THE ROAD WAS COMPLETED IN DIVISIONS, EXCEPT AS TO ONE HUNDRED AND TWENTY SECTIONS. THE EVIDENT INTENTION OF CONGRESS IN MAKING THIS EXCEPTION WAS TO FURNISH AID FOR SUCH PRELIMINARY WORK AS WOULD BE REQUIRED BEFORE THE CONSTRUCTION OF ANY PART OF THE ROAD. NO CONDITIONS, THEREFORE, OF ANY KIND WERE IMPOSED UPON THE STATE IN THE DISPOSITION OF THIS QUANTITY, CONGRESS RELYING UPON THE GOOD FAITH OF THE STATE TO SEE THAT ITS PROCEEDS WERE APPLIED FOR THE PURPOSES CONTEMPLATED."

The forfeiture act is in harmony with this construction of the granting act. The first section of the forfeiture act declares that the lands forfeited are a part of the public domain. The second section provides for the entry of such lands under the homestead law. And the third section pro-

vides for the issuance of patents to persons other than the railroad company. None of these sections contemplate judicial proceedings to annull a certificate or patent. They all contemplate the immediate summary disposition of the forfeited lands by action of the Department. They evidently refer to lands which have never been certified to the State or railroad company. The effect of this forfeiture act is simply to open for entry such lands as had been withdrawn from entry by reason of the land grant, but had not been certified to the State or railroad company. If this contention be sustained, and it is ascertained and declared by this Court that the grant of the first one hundred and twenty sections is an absolute unconditional grant then it follows necessarily that as to the one hundred and twenty sections there has been no forfeiture even though every allegation of the bill with regard to bad faith and want of consideration had been fully sustained by the evidence.

Our third contention is that as in 1860 (within the ten years) the Tennessee & Coosa Railroad Co. executed a mortgage upon the lands in controversy to secure $400,000 of bonds, of which said bonds eleven were placed in the hands of Hugh Carlisle to secure the debt due him for construction, and remained in his hands until he accepted the conveyance of the lands in controversy in payment of that debt, there was such a sale within the ten years as relieved the land from any possibility of forfeiture.

Tucker vs. Furguson, 22 Wallace 572.

Platt vs. Union Pacific Railroad Co., 99 U. S. 48.

In re Gulf & Ship Island Railway Co., 19 Dep. Dec.

Our fourth contention with regard to this one hundred and twenty sections of certified land is that complainant is barred by laches. It will be noted that the land was certified in 1860. The ten years expired June 3, 1866. Twenty-five years elapse, before the present bill was filed. The following facts with regard to the first one hundred and twenty sections are clearly established by the record.

The forfeiture sought to be enforced in the present litigation is being pressed and contended for by five or six hundred purchasers from the Tennessee & Coosa Railroad Co. who derived their possession from the railroad company, and who now seek in bad faith to repudiate their solemn obligations, evade the payment of the promised purchase money, and obtain title to their respective parcels of land by homestead entry. These parties, and not the government of the United States, are the parties really interested in this suit, and in the event of a reversal of this case would be the sole beneficiaries. THE UNITED STATES IS ONLY A NOMINAL PARTY. The language used by the Supreme Court of the United States in the case of the United States vs. DesMoines Co., 142 U. S. 510, is peculiarly applicable to the facts of this case: "We should be closing our eyes to manifest facts if we did not perceive that the government was only a nominal party, whose aid was sought to destroy the title of the Navigation Company and its grantees in order to enable the settlers to perfect their title initiated by settlement and occupany. It should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction shall make such an attempt successful." And again, as the head note in same case states the legal proposition: "It appearing that the United States is only a nominal party whose aid is

sought to destroy the title of the Navigation Company and its grantees in order to enable settlers to perfect their titles, initiated by settlement and occupancy, the Court holds the case of the United States vs. Beebe, 127 U. S. 338 to be applicable where it was held that when a suit was brought in the name of the United States to enforce the rights of individuals, and no interest of the government is involved the defense of laches and limitations will be sustained as though the Government were out of the case."

We respectfully submit that this Court will be slow to lend its aid to enable purchasers of land from the railroad company to escape the performance of the obligations into which they have voluntarily entered.

The only lands embraced in the bill other than the one hundred and twenty sections is land lying opposite to that part of the road which extends from Gadsden to Littleton, which part of the road was completed and in operation on September 29, 1890, the date of the passage of the forfeiture act.

As to this land there can be no forfeiture under the terms of the forfeiture act, because the act forfeits only "all lands heretofore granted opposite to and coterminus with the portion of any such railroad not now completed and in operation."

As the Tennessee & Coosa Railroad, from Gadsden to Littleton, was completed and in operation on Sept. 29, 1890, it is manifest that lands lying opposite to the part of the road from Gadsden to Littleton are not forfeited.

"In order that an act of Congress should work reversion to the United States for condition broken of lands

granted by them to the State to aid in internal improvement, the legislation must directly, positively, and with freedom from all doubt or ambiguity, manifest the intention of Congress to reassert the title and resume possession."

St. L., I. M. & Sou. Ry. Co. vs. McGee, 115 U. S. 459.

Far from the intention of Congress being manifest that there should be a forfeiture of these lands, it is apparent that these lands were expressly excepted from forfeiture. Then when the entire road was completed, is it not perfectly clear that the title to these lands fell into the land grant company? It will be observed that we do not contend that upon the completion of the 10.2 miles the Tennessee & Coosa Railroad Co. became entitled to this land. Our contention is that as to these lands the forfeiture act granted the Tennessee & Coosa no new or additional rights, and took away nothing from the Tennessee & Coosa Co. The forfeiture act left these lands as it found them—unearned, but subject to be earned. When earned by the completion of the entire line of road, these lands in accordance with every principle of law, justice and equity became the property of the Tennessee & Coosa Railroad Company, or its grantee, Hugh Carlisle.

It will be observed that the Court below found as a fact, based on the evidence of witness Curry, that the Tennessee & Coosa Railroad was completed along its entire line from Gadsden to Guntersville before the filing of the bill and before any act of re-entry on the part of the Government.

The case of Sioux City & St. Paul Railroad Co. 159 U. S. 349, referred to in brief of appellant's counsel is no answer to the view expressed above because that case simply decides that in a case where a land grant company has failed

to construct its entire line it can claim nothing by reason of the construction of a fractional part of a division of ten or twenty miles (as the case may be). In the case now under consideration appellees claim to have earned nothing by virtue of the completion of 10.22 miles of road. Their contention is that upon the completion of the entire line from Gadsden to Guntersville, the title to the land lying opposite to and coterminous with the 10.22 miles of road which was completed and in operation on Sept. 29, 1890, the date of the forfeiture act, became good and complete in them. To put our contention in other words: By the forfeiture act the Government resumed title to all lands lying opposite to and coterminus with the uncompleted portions of the road. It left lands lying opposite to and coterminus with completed portions of the road entirely unaffected by its provisions. These lands remain in the same condition in which they stood before its enactment. Prior to that time there can be no dispute about the proposition that until some act of re-entry, or assertion of forfeiture the land grant company continued clothed with the right to complete its line of road and thereby earn the lands. Then, as the forfeiture act did not affect the lands in controversy, it is clear that after the passage of the forfeiture act the Tennessee & Coosa Railroad Company still had the right to construct the road and earn these lands.

The act certainly means that lands lying opposite to completed portions of the road are exempt from the forfeiture declared by its terms. And when we remember that under the terms of the original granting act, it is not necessary that the earned lands should be opposite to constructed portions of the road, it is manifest that the act does not use the term "portions of road" in the sense of twenty mile section

of road. In other words it is plain that the act does not exempt from forfeiture simply the earned lands, but just as it says forfeits all unearned lands, except such as are opposite to completed portions of road.

There is no merit in the argument made by opposing counsel to the effect that even if the forfeiture act did not embrace the lands lying opposite completed portions of the road, yet the forfeiture could be asserted by a judicial proceeding, i. e., a bill filed by the attorney general to enforce the forfeiture independently of the act. This argument adds nothing to the strength of appellants position for three reasons:

First.—Because when Congress has proceeded to declare the forfeiture and has limited the extent of the forfeiture declared to certain lands, the Attorney-General cannot transgress the limitation prescribed by the act of Congress, go farther than the act prescribes, and seek a forfeiture in any case which the terms of the act exempt from the forfeiture declared therein. Until Congress acts, it is possible that the Attorney-General may authorize the filing of a bill seeking a judicial declaration of forfeiture, but when Congress has acted in the matter and has declared the extent of the forfeiture the Attorney-General cannot disregard the limitations contained in the act of Congress and proceed indepently of the act.

Second.—The bill filed in the case at bar is not framed as a bill seeking to enforce a forfeiture by judicial decree independently of the terms of the forfeiture act. The bill does not aver that the road was not completed before the filing of the bill. It at least impliedly admits that the road was completed before the filing of the bill. If it were con-

ceded that the Attorney-General might have filed a bill, basing the right of the Government to assert a fosfeiture upon the failure of the Land Grant Co. to earn the lands by the completion of the road before forfeiture asserted, yet certainly no such relief can be granted upon a bill which admits that the land was not subject to the forfeiture declared in the act, and also admits that before the filing of the bill the entire road was completed, the condition of the grant complied with, and the land thereby placed beyond the reach of forfeiture. To sustain a judicial declaration of forfeiture on the ground that the Government by filing its bill asserted a forfeiture before the Land Grant Co. earned the lands by the completion of the entire line of road, the bill must aver, what the bill in the present case wholly fails to aver, that the road had not been completed prior to filing of the bill.

Third.—Even if the bill had avered the failure of the Tennessee & Coosa Railroad Co. to complete the road before the filing of the bill, the complainant could not recover, because the record shows the truth to be that the road was in fact completed and in operation before the bill was filed.

We respectfully submit that the decree of the trial court was right and should be affirmed.

Amos E. Goodhue

Solicitor for ~~Respondents~~ Appellees.

No. 55.

Sup. Ct. Bx. of Goodrich for Appellees

Filed Dec. 15, 1899.

# Supreme Court of the United States.

No. 55.

UNITED STATES, Appellant,

vs.

THE TENNESSEE AND COOSA RAILROAD COMPANY, HUGH CARLISLE, ET ALS., Appellees.

## SUPPLEMENTAL BRIEF OF AMOS H. GOODRICH ON BEHALF OF APPELLEES.

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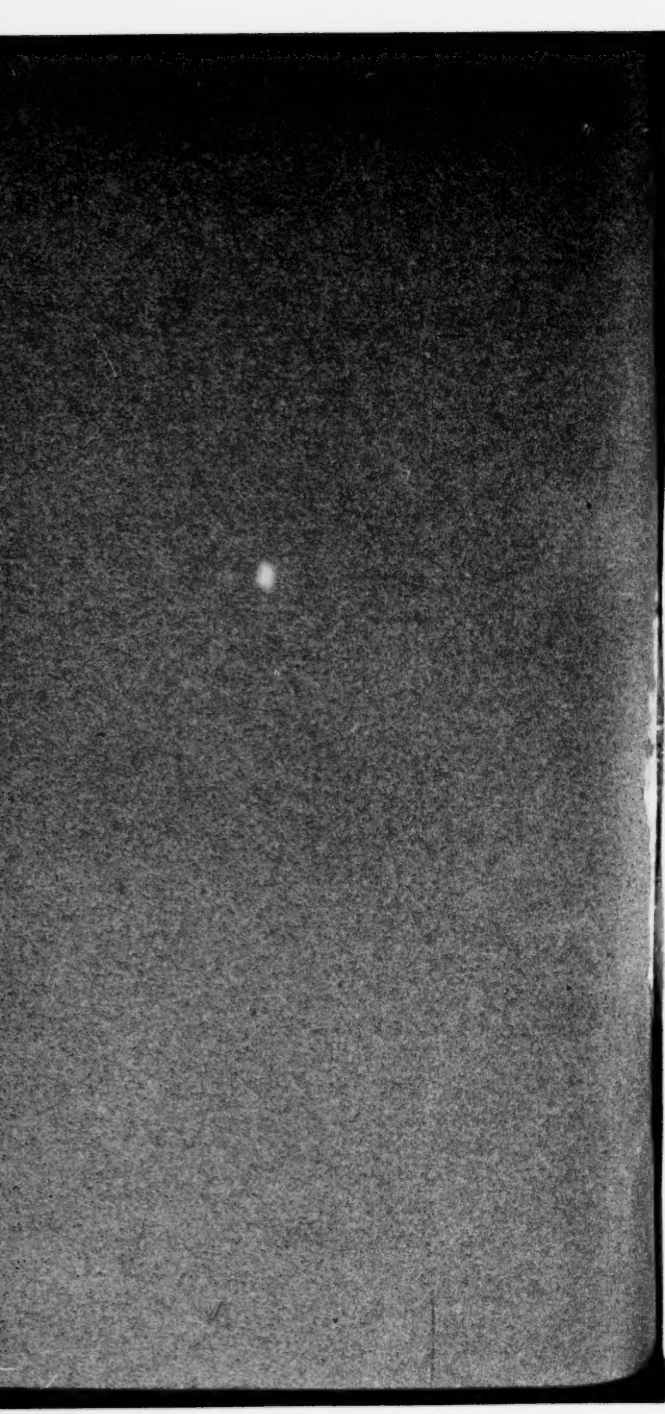

IN THE

# Supreme Court of the United States.

*No. 53.*

UNITED STATES, APPELLANT,

*vs.*

THE TENNESSEE AND COOSA RAILROAD COMPANY, HUGH CARLISLE, ET ALS., APPELLEES.

## SUPPLEMENTAL BRIEF OF AMOS E. GOODHUE ON BEHALF OF APPELLEES.

It is contended on behalf of appellant that the portion of the opinion in Schulenberger *vs.* Harriman which is cited in our former brief, to the effect that "the power to sell continues, as before its breach, limited only by the objects of the grant and the manner of sale prescribed in the act," is *obiter dictum* and not authoritative as a decision. A careful analysis of the case will, we respectfully submit, show that the language quoted is not *obiter dictum*, but was essential to the proper determination of the cause. The action was to recover logs, brought by one who was admitted to be in possession of and presumably the owner of the land on which the timber was cut against one Harriman, who seized

the timber as the agent of the State and who justified the seizure under the title vested in the State by the granting act. The plaintiff insisted that after the expiration of the time limited in the act for the completion of the road the trust ceased, and that one of two things was true—either that upon the breach of the condition the title *ipso facto* revested in the United States, or else that the title, remaining in the State, was thereafter a mere naked legal title, with no beneficial ownership and no rights, powers, or duties in connection with the land, and that thereafter the State had no right to sell the land or dispose of it in any way or do anything with it except to act as the mere depositary of the legal title. If either of these contentions were sustained, it is manifest the plaintiff in Schulenberg *vs.* Harriman could not maintain his action. In answering the second of these contentions it became necessary to define the character of the title in the State of Wisconsin, and the rights, powers, and duties attendant upon the trust reposed in the State of Wisconsin, in order to show that the State had such a title as authorized it to seize the timber in question. In thus defining this trust it was material and necessary to the proper decision of the case that the court should determine and declare whether it was true, as asserted by plaintiff's counsel in argument, that the power of disposition, the power to sell the land, had *ipso facto* ceased upon the expiration of the time limited by the terms of the granting act, and therefore the language of the court was directly in response to the issues involved in the case, and the decision is authoritative. Schulenberg *vs.* Harriman was a test case. The object of the suit was to obtain a decision as to the status of the land on which the timber was cut. The opinion of the court in this case has been approved by this court in numerous land-grant cases, in some of which the United States was a party claiming rights under the fourth section of the granting act. For twenty-five years this opinion has controlled the

rulings of the Federal and State courts in passing upon the title to the lands covered by railroad land grants. For a quarter of a century the Land Department has governed itself in the adjustment of numerous land grants by the opinion delivered in this case. The title to millions of acres of land in various parts of the Union rests upon this foundation. As in the case at bar, lands have, under the advice of counsel, been bought and sold in reliance upon this opinion, and the action of the Land Department thereunder, as well settling the law, and as establishing the policy of the Government in the matter of these land grants. For sixteen years Congress, with a full knowledge of the effect of this decision, and also a full knowledge of the fact that it was accepted by the Land Department and furnished the rule by which this department was issuing patents to thousands of acres of land, refused to declare these lands forfeited and defeated several bills introduced looking to the forfeiture of these land grants. Congress also, by the act approved March 3, 1887, directed the adjustment of these grants "in accordance with the decisions of the Supreme Court of the United States." Nothing can be plainer than that Congress has recognized the opinion in Schulenburg *vs.* Harriman as settled law and has acted thereupon. Nothing can be plainer than that Congress has seen good reason to leave these lands in the hands of its chosen trustees for an additional period of time, subject to be disposed of in furtherance of the objects and purposes of the original act; and in passing the forfeiture act of 1890, it doubtless had this decision in view, and therefore did not provide for the forfeiture of any earned or certified land, but only of such land as could, without any judicial proceedings and without the annulment or cancellation of any certificates, be summarily thrown open to entry and disposed of as public land. Again, Congress was informed as to the status of this particular land grant, and knew that one hundred and twenty sections had been certified to the

company and the proceeds applied to the construction of the road; also that the remainder of the land grant lay opposite to a completed portion of the road, and therefore knew and intended that *no* part of this land grant should be subject to the general forfeiture declared by the forfeiture act. In other words, Congress in declaring the forfeiture acted in full reliance upon the language quoted from the opinion of the supreme court in Schulenburg *vs.* Harriman as well-settled law, and relied upon this language to protect the Tennessee and Coosa Railroad Company, struggling to complete its line of road, from a harsh forfeiture. Had Congress not relied upon this fact, it doubtless would have further limited the extent of the forfeiture, or altogether have refused to pass the forfeiture act. To repudiate this opinion at this late day would result in extending a forfeiture beyond the intention of Congress, and thereby judicially declaring a forfeiture under the terms of an act which was passed by Congress under the belief, induced by the former decision of this court, that the provisions of the forfeiture act would not apply to the lands in controversy. To repudiate this opinion at this late day would unsettle the title to vast tracts of land and introduce confusion worse confounded into the administration and adjustment of land grants.

But if the question were a new one, the language used in Schulenburg *vs.* Harriman is correct in principle and in logic. The United States vested the title in these lands in the State as trustee, and authorized the State to sell the lands in furtherance of the objects of the trust. If the trust had been capable of withdrawal at any time by Congress, capital could not probably have been obtained for the building of the road upon such an insecure foundation.

Therefore, Congress provided that for ten years this grant should be irrevocable, and then provided by the insertion of a condition subsequent that at the end of this ten years it might, at its own option, revoke the grant. *Coupled with the legal title in the trustee* and *inseparably connected with it*, was

*the right to sell the land* for *the uses and purposes of the trust.* Now, by the well-settled law this condition subsequent is not self-operative. It cannot be successfully contended that the legal title *ipso facto* was divested out of the trustee and reinvested in the United States at the expiration of the ten years. Then, *can it be successfully maintained that the power to sell the land for the uses and purposes set forth in the granting act was ipso facto at the expiration of the ten years divorced from its inseparable companion, the legal title, and that the effect of the condition subsequent was to destroy the trust with all its powers and duties and leave alive only the legal title in the trustee. By what logic can it be contended that the force of the condition subsequent is sufficient to destroy the power of sale together with all the other elements of the declared trust, and yet insufficient to destroy the bare legal title which is put into the hands of the trustee only for the uses and purposes of the trust.* The only escape from this *reductio ad absurdum* is to declare as this court did in Schulenburg *vs.* Harriman, when this same question was before it, that " the power to sell continues as before its breach, limited only by the objects of the grant and manner of sale prescribed by the act."

A statement made by opposing counsel in oral argument, and also in his brief, to the effect that the railroad was not completed by the Tennessee and Coosa Railroad Company, and that therefore the road was not subject to the burdens of the granting act, is not supported by the record, and is, in point of fact, incorrect. It is true that, in 1890, parties connected with the N. C. & St. L. railway bought the stock in the Tennessee and Coosa Railroad Company, and perhaps the N. C. & St. L. railway itself supplied capital for the completion of the road, and it is true that the road is operated as a branch of the system of the N. C. & St. L. railway, but the corporate entity of the Tennessee and Coosa Railroad Company was

preserved, and the road, now completed, is unquestionably subject to the burdens of the granting act.

Parts of the brief of appellants' counsel seem to be an effort to find some few acres of land between Littleton and the first 120 sections, and thereby secure a technical reversal of this case. We deny that the record shows any such land. On the contrary, the record shows that the court below found as a fact that all the lands in controversy were covered by the two categories—*i. e.*, the first 120 sections and lands lying opposite the completed portion of the road. The lower court had before it certain exhibits to Carlisle's testimony and other original documents which could not be printed in the record, and the original papers, under order of the judge of the circuit court, were transmitted to the court of appeals and inspected by the court of appeals. This will be seen by reference to pages 263 and 264 of the printed record. With this full information before them, the two lower courts found that all the lands were embraced in the categories above mentioned. The Government now furnishes this court no data by which to determine the incorrectness of this finding of fact. This court is unable from the map, to which counsel for the Government in argument calls the attention of the court, to locate Littleton, the point to which the road was completed and in operation at the date of the passage of the forfeiture act. But, again, the bill is not framed to procure an adjustment of the limits of the grant. It contains no averments on which this court can proceed to grant relief as to adjustment of the limits of the grant. There is no contention between the parties as to this matter. An equity court would have no jurisdiction to determine this matter upon the allegations found in the bill. The bill seeks a *forfeiture* of the entire grant and does not, *recognizing* the grant, seek to *adjust its limits*. The bill makes allegations of fraud which are not sustained by the evidence. Neither the railroad company nor its grantees have been called upon to adjust the grant in accordance with the terms of the

granting act and of the forfeiture act. The bill does not aver that there are any lands in this alleged gap between Littleton and the end of the 120 sections. There is nothing in the decree of the court below to prevent any adjustment of the limits of the grant that may hereafter become necessary: and again the assignments of error in the appeal from the circuit court to the circuit court of appeals did not bring any such question before the circuit court of appeals, nor is such a question before this court.

The attention of the court is called to the fact that in 1885 Secretary Lamar recognized the grant in question as an existing and unforfeited land grant, as shown by his opinion in the case of Alabama & Chattanooga R. R. Co. *vs.* Tenn. & Coosa R. R. Co., found in 5th Departmental Decisions.

Respectfully submitted.

Amos Ellsworth

*Counsel for Appellees.*